IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GARLAND FAVORITO, MICHAEL SCUPIN, TREVOR TERRIS, SEAN DRAIME, CAROLINE JEFFORDS, STACEY DORAN, CHRISTOPHER PECK, ROBIN SOTIR, and BRANDI TAYLOR, Petitioner(s), v. FULTON COUNTY; FULTON COUNTY BOARD OF REGISTRATION AND ELECTIONS; and FULTON COUNTY CLERK OF SUPERIOR AND MAGISTRATE COURTS, Respondent(s).	CIVIL ACTION FILE NO.: 2020CV343938

RESPONDENT FULTON COUNTY'S BRIEF IN SUPPORT OF MOTION TO DISMISS PETITIONERS' COMPLAINT

COMES NOW, Fulton County, Georgia ("Fulton County"), by special and limited appearance, without submitting to the jurisdiction of the Court, and hereby files this Motion to Dismiss Petitioners' Garland Favorito, Michael Scupin, Trevor Terris, Sean Draime, Caroline Jeffords, Stacey Doran, Christopher Peck, Robin Sotir, and Brandi Taylor's (collectively, "Petitioners") Complaint pursuant to O.C.G.A. §§ 9-11-12(b)(4)-(5).

INTRODUCTION AND FACTUAL BACKGROUND

On December 23, 2020, Petitioners filed a Petition against Mary Carole Cooney, Vernetta Keith Nuriddin, Kathleen Ruth, Aaron Johnson, Mark Wingate, and Richard Barron (collectively, "Original Respondents"), in their individual capacities, seeking injunctive and declaratory relief (See Original Petition, filed December 23, 2020). Following this filing, Petitioners sought to substitute Original Respondents with Fulton County, the Fulton County Board of Registration and

Elections, and the Clerk of the Superior Court of Fulton County (collectively, "Substituted Respondents"). (See Motion to Substitute Parties, filed January 27, 2021). The Court granted this request and entered an Order substituting the Original Respondents with the Substituted Respondents. (See Order Granting the Motion to Substitute Parties, filed April 21, 2021).

Subsequent to Fulton County being substituted into this case, Petitioners have failed to serve or even attempt to serve Fulton County, in accordance with O.C.G.A. § 9-11-4, in order to establish personal jurisdiction over Fulton County. As such, this Court does not have personal jurisdiction over Fulton County.[1] Accordingly, Petitioners' Complaint against the Fulton County should be dismissed for insufficient process and service of process. See *Merck v. St. Joseph's Hospital of Atlanta*, *Inc. et al.*, 251 Ga.App. 631, 632 (2001).

ARGUMENT AND CITATION OF AUTHORITY[2]

I. MOTION TO DISMISS STANDARD

A party may file a responsive pleading to assert insufficient process or service of process. O.C.G.A. § 9-11-12(b). A complaint is properly dismissed where a plaintiff fails to properly serve the defendant with sufficient service and service of process to obtain personal jurisdiction over the defendant. *Merck v. St. Joseph's Hospital of Atlanta*, *Inc. et al.*, 251 Ga.App. 631, 632 (2001).

Even in the context of a substitution, a party must be served after being substituted into the case before the Court has personal jurisdiction over that party. In *Anglin v. State Farm Fire & Cas. Ins. Co.*, the Court of Appeals stated that "[i]n instances in which a party attempts to add a new party to a pending matter as a direct defendant, service of process must be made in the same

[1] A review of the docket reveals that Petitioners have apparently not served the Fulton County Board of Registrations and Elections either. (See Court's Docket, Fulton County Superior Court Case No. 2020CV343938).

[2] Respondent Fulton County joins in the arguments made by the Clerk of Superior and Magistrate Court in her Motion to Dismiss and joins in the arguments made by the Fulton County Board of Registrations and Elections in its Motion to Stay.

manner as though the new party was an original defendant." 348 Ga. App. 362, 365 (2019). In *Gaskins v. A.B.C. Drug Co.*, the Court of Appeals stated that the record was undisputed that Defendant A.B.C. was never served with process as provided by law, and explained that "[w]hile OCGA § 9–11–15 (a), in conjunction with OCGA § 9–11–21, is authority for a trial court to grant a motion to add a party to a pending action, the grant of such a motion does not dispense with the requirement that a new defendant be served. If a motion to add a party is granted, service of process must be made in the usual way. Even if defendant has knowledge of a pending suit, the *sine qua non* is service of summons in the manner provided by law. Hence, dismissal of plaintiff's action based on insufficiency of service of process was proper." 183 Ga. App. 518, 519 (1987) (internal citations omitted). Similarly, in *CMT Inv. Co. v. Automated Graphics Unlimited, Inc.*, the Court of Appeals held that "even where a party is added as a direct defendant in an action in which the party is already a third-party defendant, service of process must be made in the usual way; that is, in accordance with the provisions of OCGA § 9–11–4. Without such service, the trial court lacks jurisdiction to proceed in regard to that party as a direct defendant." 175 Ga. App. 353 (1985).

II. FULTON COUNTY IS ENTITLED TO DISMISSAL BECAUSE OF LACK OF SERVICE.

Insufficient service of process is an affirmative defense that justifies dismissal of Petitioners' case. See, O.C.G.A. § 9-11-12(b)(5). Thus, a motion to dismiss is the proper vehicle to seek resolution of the issue of lack of service or insufficiency of service of process. *Terrell v. Porter*, 189 Ga. App. 778 (1989). Under Georgia law, proper service of a summons and complaint "is necessary for [a] court to obtain jurisdiction over a defendant" – i.e., to make the defendant subject to any rulings or orders (including an order of judgment) entered by the court in a particular case. *Connor v. Oconee Federal Savings & Loan Ass'n*, 338 Ga. App. 632, 634 (2016). In the

absence of proper service, therefore, ***the court lacks authority to enter any order*** other than one dismissing the case for lack of jurisdiction. *Id.*

Petitioners have failed to serve Fulton County. The law provides that a defendant is to be served personally, "or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process." O.C.G.A. 9-11-4 (e)(7). Petitioners have failed to serve Fulton County and this case should be dismissed for lack of service. If service is never perfected and is not waived, the court does not acquire jurisdiction of the defendant and the suit is void. *Anthony Hill Grading, Inc. v. SBS Investments, LLC*, 297 Ga. App. 728 (2009); OCGA §9-11-12(b)(2). When service is not timely made, the plaintiff bears the burden of showing lack of fault. *Patterson v. Lopez*, 279 Ga. App. 840 (2006). Accordingly, Petitioners' Complaint should be dismissed for lack of service.

III. PETITONERS CLAIMS AGAINST FULTON COUNTY ARE BARRED BECAUSE FULTON COUNTY HAS NO CONTROL OVER ELECTIONS.

With respect to Fulton County, it is an improper party because it is not the final policymaker with control over elections. The Elections Code states that where there is a board of elections, that entity acts as a superintendent and conducts elections and primaries. O.C.G.A. §§ 21-2-2(35); 21-2-70. Interpreting the Elections Code, courts have confirmed that a board of elections is "vested with broad powers to manage the conduct of elections on behalf of the state" and that the County has little management control. See *Casey v. Clayton County,* 2007 WL 788943 at 8. In *Casey*, the Court also noted that although the Clayton Commission was granted budgetary control in regards to its board of elections, the court questioned the true extent of the county's budgetary authority in light of state obligations regarding the conduct of elections. *Id.*, 2007 WL

788943, *8. The Election Code and case law demonstrate that Fulton County cannot be the final policymaker in regards to conducting elections and Plaintiff has failed to allege otherwise. *Mandel v. Doe*, 888 F.2d 783 (11th Cir. 1989) (stating that whether an official has final policymaking authority is a question of state law). Thus, because Fulton County is not the election superintendent, it is not a proper party to this action that complains about the November 3, 2020 General Election.

Further, "[a]ctions the County is liable for under § 1983, should also be those it has the authority to remediate." *Vandiver v. Meriwether County, Georgia*, 325 F.Supp.3d 1321, 1332 (2018)(granting County's motion to dismiss). Fulton County has no authority to remediate any of Plaintiff's concerns regarding the processing of absentee ballots. Fulton County's inability to address any of these alleged problems demonstrates that it has no control or authority over the management of the election and thus cannot be liable for any alleged constitutional violation. Thus, Fulton County is an improper party and should be dismissed.

IV. PETITIONERS ARE NOT ENTITLED TO DECLARATORY JUDGMENT.

A. Standard for Declaratory Judgment

In their prayer for relief, Plaintiff requests "that the Court Declares that the Respondents have violated the state equal protection clause; . . . that the Court Declares the Respondents have violated the state due process clause." The purpose of the Declaratory Judgment Act is "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." *Agan v. State*, 272 Ga. 540, 542 (2000). The Act authorizes the superior court to enter a declaratory judgment in cases of actual controversy and to determine and settle by declaration any justiciable controversy of a civil nature where it appears to the court that the ends of justice require that such should be made for the guidance and protection of the petitioner, and when such

a declaration will relieve the petitioner from uncertainty and insecurity with respect to his rights, status, and legal relations. *See Calvary Independent Baptist Church v. City of Rome*, 208 Ga. 312 (1951). "However, no declaratory judgment may be obtained which is merely advisory, or fruitless, or which merely answers a moot or abstract question." *East Beach Properties, Ltd. V. Taylor*, 250 Ga. App. 798, 802 (2001). See also, *Liner v. City of Rossville*, 212 Ga. 664 (1956); *Cook v. Sikes*, 210 Ga.722 (1954).

Declaratory judgments that are merely advisory are unauthorized. *See Higdon v. City of Senoia*, 273 Ga. 83, 85 (2000). A declaratory judgment would be considered advisory in four circumstances. First, where the party seeking the declaratory judgment fails to show it is in a position of uncertainty as to an alleged right or, second, where the rights of the parties have already accrued and the party seeking the declaratory judgment does not risk taking future undirected action. *Id.* Third, a declaratory judgment would be advisory if it were rendered based on a possible or probable future contingency. See *Baker v. City of Marietta*, 271 Ga. 210 (1999). Finally, if the claim for declaratory judgment presents a question of academic interest, then declaratory judgment would be advisory. *Id.* at 214.

B. The Petition Fails to State a Claim Entitling Petitioners to Declaratory Judgment Because Petitioners Seeks an Advisory Opinion.

A declaratory judgment of the respective parties' rights and obligations, pursuant to the Georgia constitutional provision advanced by Petitioners, should be denied as an improper advisory opinion. Georgia courts are only empowered to grant declaratory relief when there is an actual, justiciable controversy between the parties. *Baker v. City of Marietta*, 271 Ga. 210, 213 (1999). Where the rights of the parties have already accrued and the party seeking the declaratory judgment does not risk taking future undirected action, a declaratory judgment would be improper.

In the present case, Petitioners seek an advisory opinion, as they do not risk taking a future undirected action and the rights of the parties have already accrued.

Petitioners seek a declaration that the Respondents have violated the State Equal Protection Clause and the State Due Process Clause, with respect to absentee ballot processing in the November 3, 2020 General Election. (*See* Counts I – VI of Petition). However, these clams are based on past actions and Petitioners seek no future guidance or remedy, merely a declaration. Petitioners have asserted to this Court and the Court has accepted the representation that this case is not an elections contest and Petitioners are not seeking a re-tabulation of any alleged fraudulent or miscounted ballots. (See January 6, 2021 Hearing Transcript, p. 25, lines 17-20; March 15, 2021 Hearing Transcript , p. 19, lines 22-25 - p. 20 line 3; May 21, 2021 Hearing Transcript, p. 80, line 25 – p. 81, line 1). Accordingly, a declaratory judgment at this juncture would be an improper "advisory" opinion. *Baker*, 271 Ga. at 214.

Petitioner has also failed to show that there is uncertainty as to future conduct by the Petitioner, inasmuch as there is a statute, O.C.G.A. 21-2-1 et seq. that already clearly sets forth the future process and settles and affords relief from uncertainty and insecurity with respect to rights, status, and other legal relations. Absent "future uncertainty" the Petition for Declaratory Judgment should be dismissed. *Empire Fire & Marine Ins. Co., v. Metro Courier Corp.*, 234 Ga. App. 670 (1998).

V. PETITIONERS HAVE FAILED TO COMPLY WITH THE ELECTION CONTEST REQUIREMENTS.

A. Petitioners Complaint Should be Dismissed Because They Have Failed to Follow the Statutory Procedures Required in an Election Contest.

The January 4, 2021 Order appointing this Court to this case, states:

in accordance with O.C.G.A. § 21-2-523(d), Flint Circuit Chief Judge Brian J. Amero, has been requested, and has agreed to conduct the above-referenced **election contest**.

(emphasis added). Fulton County acknowledges that Petitioners have asserted that this action is not an "election contest." Perhaps, because they do not seek to overturn a particular election. However, the claims raised, rather than the remedy sought, determines whether this matter constitutes an election contest.

O.C.G.A § 21-5-520 sets forth the following with regards to suits contesting the results of an election:

> **A result** of a primary or election may be contested on one or more of the following grounds:
> (1) **Misconduct, fraud, or irregularity by any primary or election official or officials sufficient to change or place in doubt the result**;
> (2) When the defendant is ineligible for the nomination or office in dispute;
> (3) **When illegal votes have been received or legal votes rejected at the polls sufficient to change or place in doubt the result;**
> (4) For any error in counting the votes or declaring the result of the primary or election, if such error would change the result; or
> (5) For any other cause which shows that another was the person legally nominated, elected, or eligible to compete in a run-off primary or election.

(emphasis added). In the instant matter, Petitioners are certainly seeking to challenge the results of the November 3, 2020 election. They are demanding access to absentee ballots in order to examine those ballots to foster their theory that counterfeit ballots were counted. Although Petitioners are not seeking to overturn any particular race, they are certainly challenging the election results. Further, throughout their Petition, Petitioners allege that illegal and counterfeit ballots were received. Indeed, the underlying refrain in the Petition is that the election results are in doubt! As noted above, misconduct by election officials and illegal votes are two of the grounds upon which an election challenge is brought. And indeed the very claim raised by Petitioners are the types of allegations that are to be redressed through O.C.G.A. § 21-2-520 et seq.

Petitioners have also failed to: (1) timely file this contest; (2) have the Respondents properly served; (3) name the appropriate Respondents; and (4) serve the Chairman of the State Election Board , among other things, pursuant to O.C.G.A. § 21-2-524. The Election Contest Statute sets forth very precise and detailed procedural mechanisms affording Superior Courts with jurisdiction to review election disputes. These carefully crafted statutory protocols "reflect the legislature's strong desire to avoid election uncertainty and the confusion and prejudice which can come in its wake." *Broughton v. Douglas County Bd. Of Elections*, 286 Ga. 528, 528-29 (2010).

Petitioners arguments belie the assertion set forth in their January 5, 2021 Supplemental Brief in Support of Petitioners Right to Access to the State Farm Arena Ballots that this is not an election contest. It is true Petitioners are not asking the Court to overturn any election results, but that is but one remedy. The Court should not sanction this attempt to disguise this petition as something other than an election contest. Georgia law has set forth a remedy for the very harm alleged by Petitioners; yet, Petitioners have not complied with the requirements of that law. Because Petitioners have not complied with the procedural mandates of O.C.G.A. § 21-2-524, their Petition should be dismissed.

CONCLUSION

Petitioners failed to even attempt to serve Fulton County, thus this Court lacks jurisdiction over Fulton County. Further, Fulton County is not a proper party to this case, Petitioners are not entitled to an advisory declaratory judgment and Petitioners have not complied with the procedural requirements applicable to this election contest. Accordingly, Fulton County's Motion to Dismiss should be granted and Petitioners' Complaint should be dismissed as a matter of law.

Fulton County reserves the right to file an Answer and assert any applicable defenses against it if and when the Complaint is properly served on Fulton County.

Respectfully submitted, this 26th day of May, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed and served RESPONDENT FULTON COUNTY'S BRIEF IN SUPPO9RT OF MOTION TO DISMISS PETITIONERS' COMPLAINT using the Odyssey e-File GA system, which automatically sends email notification of such filing to all attorneys of record and which constitutes effective service upon all attorneys of record.

This 26th day of May, 2021.

/s/ David R. Lowman
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